New Life Bakery, Inc. *and* Glass Molders, Pottery, Plastic and Allied Workers International Union, Local No. 164–B, AFL–CIO. Cases 32–CA–10445 and 32–CA–10687

January 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On August 15, 1990, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified and to adopt the recommended Order as modified.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3.

''3. By soliciting grievances and promising to take corrective action; by threatening employees with plant closure and other adverse actions for engaging in union activities; by threatening employees with discharge or suspension for complying with an NLRB subpoena; by attempting to interfere with an employee's right to talk to other employees about joining or assisting the Union; and by physically attacking picketers and strikers, Respondent has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, New Life Bakery, Inc., Hayward, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) Soliciting grievances from employees and either expressly or impliedly promising to rectify them in order to cause employees to become disaffected with the Union; threatening employees with plant closure and other adverse actions for engaging in union activities; threatening employees with discharge or suspension for complying with an NLRB subpoena; or attempting to interfere with an employee's right to talk to other employees about joining or assisting the Union.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT layoff or suspend employees because they engaged in union activities.

WE WILL NOT refuse to reinstate strikers, refuse to reinstate strikers in a timely proper manner, or refuse to reinstate strikers to their proper position of employment or at the proper wage rate.

WE WILL NOT solicit grievances from employees and either expressly or impliedly promise to rectify them in order to cause employees to become disaffected with the Union; threaten employees with plant closure and other adverse actions for engaging in union activities; threaten employees with discharge or suspension for complying with an NLRB subpoena; nor attempt to interfere with an employee's right to talk to other employees about joining or assisting in the Union.

WE WILL NOT physically attack or assault representatives of the Union, strikers, or picketers.

WE WILL NOT refuse to bargain collectively with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Maria Thigpen immediate and full reinstatement to the position that she would have occu-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge inadvertently failed to include in his Conclusions of Law and recommended Order the finding that the Respondent violated Sec. 8(a)(1) by attempting to interfere with an employee's right to talk to other employees about joining or assisting the Union, and neglected to include two 8(a)(1) violations in his recommended Order. We shall amend the Conclusions of Law, recommended Order, and notice accordingly.

pied if she had not been denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that she would have been performing or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges.

WE WILL make whole Maria Thigpen, Daniel Ballesteros, Mario Hernandez, Salvador Lopez, Jorge Pineda, Juan Pineda, Francisco Rodriguez, Pedro Rojas, and the 13 employees suspended for attending the NLRB hearing for any loss of pay they may have suffered as a result of the actions against them, with interest.

WE WILL remove from their files any reference to the layoffs, suspensions, or refusals to reinstate, of the above employees and notify them in writing that this has been done and that these personnel actions will not be used against them in any way.

WE WILL, on request, recognize and bargain collectively with the Union as the exclusive collective-bargaining representative from June 28, 1989, with respect to our employees in the unit described below, regarding wages, hours, and others terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> All full-time and regular part-time production employees, shipping and receiving employees, drivers and mechanics employed by New Life Bakery at its 21595 Curtis Street, Hayward, California facility; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

NEW LIFE BAKERY, INC.

George Velastegui, Esq., for the General Counsel.
Robert L. Rediger, Esq. (Thierman, Cook, Brown & Prager), of San Francisco, California, for the Respondent.
William Sokol, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on January 24 through February 2, 1990. On July 12, 1989, Glass, Molders, Pottery, Plastic and Allied Workers International Union, Local No. 164-B, AFL–CIO (the Union) filed a charge in Case 32–CA–10445 alleging that New Life Bakery, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (29 U.S.C. § 151 et seq.) (the Act). On November 2, 1989, the Union filed a charge in Case 32–CA–10687 against Respondent alleging violations of Section 8(a)(5), (3), and (1) of the Act. On January 5, 1990, the Regional Director for Region 32 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent, a California corporation, has been engaged in business as a custom baker and processor of natural food snack items in Hayward, California. During the 12 months prior to issuance of the complaint, Respondent purchased and received at its Hayward facility goods, products, and materials valued in excess of $50,000 directly from sources located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In May 1989, the Union began its organizing campaign at Respondent's facility. On June 21, the Union filed its representation petition with Region 32 in Case 32–RC–3011. The Union enclosed copies of 47 union authorization cards with its petition. There were approximately 77 employees in the bargaining unit at that time.[1]

The Union conducted three meetings of Respondent's employees at which the Union obtained most of its authorization cards. The employees in the bargaining unit are predominantly Spanish speaking. The union meetings were conducted in Spanish by Ignacio De La Fuente, an International representative, and David Bacon, a union organizer. Both union agents are fluent in Spanish and English. The first meeting was held at the home of employee Salvador Lopez and the next two meetings were held at the union hall in Oakland, California. At all three meetings the Union distributed union authorization cards.

The General Counsel contends that the Union represented a majority of the employees in the bargaining unit based on the union authorization cards obtained by the Union during the time period June 3 through 21. The cards state as follows:

[1] The parties stipulated that the following unit is the appropriate unit for collective bargaining within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time production employees, shipping and receiving employees, drivers and mechanics employed by Respondent at its 21595 Curtis Street, Hayward, California facility; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

> I, the undersigned employee, designate the Glass, Molders, Pottery, Plastics & Allied Workers International Union (AFL–CIO, CLC) to act as my collective bargaining agent.
>
> I further authorize that this card may be used to obtain a secret ballot election to be conducted by the National Labor Relations Board.

At the union meetings, De La Fuente explained that the purpose of the union authorization card was to give the Union authority to represent the employees in collective bargaining and that the Union would file a petition with the Board if it became necessary.[2] De La Fuente further explained the benefits of joining the Union and having a union contract. The Union obtained a majority of its cards at these meetings. In addition, some cards were obtained by individual employees from their coworkers.

On June 21, De La Fuente filed a representation petition with the Board in Oakland and then went to Respondent's facility in Hayward to request bargaining. De La Fuente and Bacon spoke with David Marson, Respondent's plant manager. De La Fuente told Marson that the Union represented a majority of Respondent's employees and requested bargaining. De La Fuente offered to have a neutral party conduct a card check to verify the Union's majority status. Marson told the union agents that they would have to speak to his father, Richard Marson, Respondent's president. While leaving the plant, De La Fuente and Bacon exchanged greetings with several employees working in Respondent's granola department. Michael Thigpen, supervisor,[3] was present and observed De La Fuente and the employees.

De La Fuente called Richard Marson and requested recognition and bargaining. He again offered to demonstrate the Union's majority through a card check. Marson advised De La Fuente that he was going to hire an attorney to handle the matter. On June 24, the Union received four additional union authorization cards.

On June 28, Respondent laid off seven employees who had been working full time on the granola bar line. The seven employees were Daniel Ballesteros, Mario Hernandez, Salvador Lopez, Jorge Pineda, Juan Pineda, Francisco Rodriguez, and Pedro Rojas. The employees were told (through an interpreter) that the layoffs were due to a slowdown in granola orders. The written layoff notices given to employees stated that the layoff was ''due to a slowdown in orders.''[4] The employees were laid off in the middle of a shift while there was dough waiting to be processed. The granola employees had been working overtime prior to the layoffs and there was an unprecedented demand for granola bars. Further, back orders for granola bars were at an all time high.

On or about July 20, Respondent recalled Salvador Lopez, Jorge Pineda, Juan Pineda, and Francisco Rodriguez on a part-time basis (about 3 hours) for 5 days. Thereafter, on July 25, they were reinstated on a full-time basis. In the first week of August, Daniel Ballesteros was reinstated. Mario Hernandez and Pedro Rojos have never been recalled from layoff. General Counsel concedes that in August Respondent had a reduction in orders for granola bars and a business justification for layoffs at that time.

Gilbert Pritchard, president of Barbara's Bakery, the customer for Respondent's granola bars, testified that his company was in the middle of a promotional campaign to sell granola bars. This promotional campaign was partially funded by Respondent. Pritchard frequently called David Marson to complain that he needed more granola bars and that the lack of production ''was crippling'' his company. Marson did not inform Pritchard of the layoffs. Marson told Pritchard that the failure to keep up with demand was due to problems with the machine that sealed the bars. In August, Pritchard ceased ordering granola bars from Respondent.

David Marson testified that the reasons for the layoffs were (1) a slowdown in orders; (2) the quality of product was not good and the rate of return was high; (3) the production rate of granola employees was down; and (4) Respondent believed that Barbara's Bakery was over-ordering granola bars because Barbara's was anticipating a union strike. Marson contradicted himself and admitted that there was no slowdown in orders and that he had given an untruthful reason to the laid-off employees. Marson further admitted that he had not given the alleged over-ordering by Barbara's as a reason for the layoffs when he gave a sworn statement to the Board during the investigation of the case. It appears Marson did not come up with the over-ordering defense until after the layoffs, when he learned in July that the Union had contacted Pritchard. After learning that the Union contacted Pritchard, Marson determined that the Union was the reason Barbara's was ''over ordering'' and decided to limit granola production for Barbara's. However, Marson had laid off the employees prior to obtaining this knowledge. Thus, this could not have been one of the reasons for the layoffs.

In his testimony, Marson never addressed the amount of production required by the granola promotion partially funded by his company. Marson was not a believable witness. On direct examination he testified confidently and answered his counsel with no difficulty. However, when questioned by the General Counsel, Marson's demeanor changed quite noticeably and he faltered and looked to his counsel for assistance

[2] Respondent contends that De La Fuente told the employees that ''the cards would be used *only* to get an election.'' First, I credit De La Fuente that he told the employees that the cards were to obtain authority to represent the employees *and* to present to the Board in support of a petition if voluntary recognition could not be obtained. Second, I find no clear or unambiguous testimony that De La Fuente said the cards would *only* be used for an election. Nine employees indicated on cross-examination that an election was mentioned or explained but did not clearly testify that the sole or only purpose of the card was for an election. The employees did not understand the significance of counsel's use of the word only. Not one employee testified that the word only or its Spanish equivalent was utilized by De La Fuente or Bacon. In some manner each employee witness indicated that he or she knew that card was for union representation. I reject Respondent's argument that nine of the authorizations are invalid based on representations that the cards were for an election only.

[3] Although Respondent denies that Thigpen was a supervisor, the evidence establishes supervisory status. Thigpen was listed in Respondent's records as manager for hand production and pre-mix. The records also referred to him as a supervisor and ''head of a department.'' Thigpen gave employees written warnings and letters of termination. Thigpen initialed employees' timecards and made corrections to them. He worked overtime hours but was not paid for overtime. Thigpen changed his own timecard to reflect that overtime hours were not to be compensated. David Marson testified that Thigpen had a separate contract with Respondent. Marson testified that Richard Marson, his father, had negotiated the agreement with Thigpen, and that he, David, was unaware of its terms. Neither Richard Marson nor Michael Thigpen testified in this proceeding.

[4] The layoff notices recited that the employees would be given ''the chance for rehire before any employees were hired on granola production.'' No explanation was given as to why these employees were not considered for openings in other areas of production.

before answering. This occurred even when questioned about the same subject matter previously testified to with ease. Marson never explained why he gave false reasons to the granola employees. Nor did he explain his lack of candor with Pritchard and the Board. Based on his demeanor and visible disregard for the truth, I do not credit David Marson's testimony unless corroborated by documentary or other credible evidence.

Marson attempted to justify the layoffs by testifying that there was a problem with the quality of the granola bars being produced which caused a high rate of returns. However, Marson and Respondent never rebutted Pritchard's testimony that there were more returns in the earlier part of 1989 and that quality had improved just prior to the layoffs. Marson's testimony regarding the layoffs was self-contradictory, shifting, and evasive. Moreover, documentary evidence was not produced to corroborate his testimony. Some evidence of returns were produced, but these selective bits of evidence did not contradict Pritchard's testimony and led to an inference that a complete record of returns would be adverse to Marson's testimony.

On June 30, Respondent conducted a mandatory employee meeting of production employees. All employees from both shifts were required to attend. The meeting was held in response to the Union's organizing campaign. The meeting was conducted by Jay Colbert, evening shift plant manager, and David Marson in English. Miriam Flores, a production employee who also worked in the office, was asked by Marson to translate into Spanish for the employees.[5] Colbert started the meeting by telling the employees that he had learned that a group of employees wanted to form a union and that Respondent opposed forming a union. He said he knew employees were upset about the recent layoff of the granola employees but he assured the employees that the layoff was because of a lack of work and not because of the Union. He said he wanted to find out why the employees wanted a union. Colbert asked the employees to voice their complaints so that Respondent could ''rectify'' or ''solve'' their complaints. No one responded to this question. Colbert offered to put up a suggestion box so that employees could make their complaints known. Colbert said that he didn't need outsiders to come in and tell him how to run the business. He said the plant was like Respondent's house and the employees were invited guests. He went on to say the guests should not insult the furniture or possessions of the host. If the guests were unhappy they go elsewhere to work. Finally Colbert stated that Respondent would never recognize or negotiate with the Union. He said Respondent would shut down rather than let the Union into the plant. Colbert ended the meeting by telling the employees that there would now be employee meetings each week.

Colbert testified that he opened the meeting by telling employees that he heard they were trying to organize and that they had every right to organize. According to Colbert he asked the employees what their problems were but no one responded. He denied offering to remedy or rectify their grievances. He admitted referring to the Union as guests in Respondent's home and saying that ''the guests shouldn't berate the furniture.'' Miriam Flores, still employed by Respondent, was not called to testify and, therefore, did not deny the statements attributed to her by the employee witnesses.[6] Rosa Lynn, a unit employee, testified that Colbert and Flores did not make the statements attributed to them. However, I did not find Lynn to be a credible witness. She could not recall what was said but was quick to deny that Colbert had made any promises or threats.

On July 5, David Marson learned that at least 23 employees had been subpoenaed by the Union to attend the hearing in the representation case, scheduled for later that day. One hour later, Marson gathered the subpoenaed employees and told them that their subpoenas were ''invalid'' and that they could be permanently replaced if they chose to leave work. Marson did not state why the subpoenas were invalid nor did he inform the employees that the hearing had been postponed until July 10. De La Fuente arrived at the facility that morning and informed the employees that the hearing would take place on the morning of July 10.

Marson testified that he believed the subpoenas were invalid because his attorney had suggested that no witness fees had been tendered and therefore the subpoenas were void. Marson admitted that he did not ask and the employees did not tell him that the fees had not been tendered. The attorney had just learned from Marson that the subpoenas had been served. How the attorney could have known that fees were not tendered was not explained. Marson also admitted that he did not mention the absence of fees in his pretrial affidavits. I do not credit Marson's testimony regarding these incidents. Here again, Marson appears to be justifying his action with knowledge he obtained after the fact.

On July 7, Colbert and Marson conducted another employee meeting with Flores serving as translator. The announced purpose of the meeting was to discuss the representation hearing then scheduled for Monday, July 10. Marson told the employees that they could be permanently replaced if they insisted on going to the hearing. He told the employees that they could select three employees from each shift to attend the hearing as representatives of the other employees. The employees wanted to attend the hearing and were unable to agree on representatives. Marson testified that he did not know the subpoenas for July 5 were still in effect. He is not credited on this point. Marson referred to the selection of representatives for the ''subpoenaed employees'' in his testimony. Further, Colbert testified that prior to the meeting, Marson told him that the ''subpoenaed employees'' wanted to attend the hearing.

On July 10, Marson had written suspensions ready for the 13 day shift employees who left work to attend the hearing. As the employees clocked out to attend the hearing Marson handed them written suspension notices. He made no attempt to stop the employees and did not tell them that Respondent was not attending the hearing. When questioned as to why he did not tell the employees that Respondent and its counsel were not attending the hearing, Marson testified that he

[5] Flores often translated for Respondent.

[6] Respondent argues that Miriam Flores was equally available to the General Counsel as a witness. I do not agree. Flores was employed by Respondent and often used by Respondent as an interpreter. Respondent made Flores its agent for purposes of this meeting. After General Counsel's witnesses testified as to the statements made by Flores, the burden shifted to Respondent to explain or deny those statements.

It is entirely possible that Flores did not translate accurately Colbert's statements to the employees. However, Respondent chose the method of communication and therefore, assumed the risks involved in the translation.

''didn't think there was a reason to.'' The employees were suspended for 9 days.

Respondent did not attend the hearing allegedly because it was willing to stipulate concerning all issues. Respondent notified the Regional Director approximately 20 minutes prior to the hearing that it would not attend. The Union did not learn that Respondent was not participating in the hearing until minutes before the scheduled opening. Thus, the employees had no way of knowing that their attendance was not necessary. Moreover, telephone calls made by De La Fuente prior to that morning, to discuss the hearing and accommodate Respondent regarding the number of employees, were not returned.

On July 11, the employees of Respondent went on strike to protest the layoffs of the granola employees and the suspension of the subpoenaed employees. The General Counsel alleges that David Marson assaulted Bacon and later De La Fuente on the picket line. De La Fuente testified that he observed Bacon and Colbert arguing at the picket line when Marson, without warning, struck Bacon in the face. Bacon fell to the ground and De La Fuente intervened. Marson and De La Fuente then exchanged punches but were separated by others within a few moments.

Bacon, although present for much of the hearing, did not testify. No reason was given for his failure to testify. Normally, I would draw an adverse inference from the failure of the General Counsel and the Union to call Bacon to testify. The failure of Bacon to testify leads to an inference that his testimony would be adverse to the Union's case. However, here the only testimony I have is from De La Fuente, a credible witness, and Marson, an extremely unreliable witness. I choose to credit De La Fuente's testimony.

Colbert and Marson testified that they were escorting two employees to the plant that morning when De La Fuente reached for one of the employees. Marson intervened and a fight broke out. Colbert and Marson could not recall who threw the first punch. I found Marson and Colbert to be less than candid in testifying to these events. These two witnesses tried to minimize their conduct and overstate the misconduct of their adversary. Accordingly, based on the testimony of De La Fuente, I find that Marson physically attacked the union agents in the presence of employees without provocation.

The complaint alleges that on July 17, David Marson attacked an employee on the picket line. On that date, an unidentified picketer threw an egg at Marson. Marson ran toward the picketers and chased after employee Jorge Pineda, the only male picketer in the area. Pineda, who had not thrown the egg, saw the much bigger Marson chasing him and started to walk away. Marson chased Pineda and pinned him against a fence. Marson continued to hit Pineda until seven or eight female picketers pleaded with him to stop. No one had struck Marson at any time.

Marson testified that he saw *Juan* Pineda throw an egg at him. According to Marson, while he was walking towards Juan, he saw Jorge gesture as if he was going to throw an egg. Marson was hit from behind by two picket signs and could not recall what else occurred. He denied ever chasing anyone and denied pinning Pineda to the fence. Again, I find Marson's testimony to go against the weight of the evidence.

Jack Stein testified that he was hit with an egg and that he saw Marson chase Freddy Reyes. The evidence established that the employee involved was actually Jorge Pineda. Even if Marson was reacting to egg throwing, I find that this attack on Pineda went beyond the normal reactions to such misconduct. I find Marson was delighted to seize upon some excuse to physically beat a striking employee.

On August 8, employee Freddy Reyes and De La Fuente were injured in a fight which broke out on the picket line. That morning prior to picketing some employees were drinking coffee at a catering truck near Respondent's plant. A strike replacement employee named Charles Jackson was also at the catering truck. As Jackson was returning to work, a striker threw a piece of bread at him. Jackson demanded to know who threw the bread. De La Fuente told Jackson that it was nothing and that the employee should return to work. Jackson returned to the plant without incident.

Shortly thereafter, Jackson returned with Antonio Miller, a nonstriking employee. Miller screamed at De La Fuente ''I want to talk to you. Why you fucking with my brother—he's just a kid. He's just 16 years old.'' De La Fuente answered that nothing had happened to Jackson and that Miller should go back to work. Miller threatened De La Fuente but before they could begin fighting several female picketers got between them. As Miller and Jackson were returning to the plant, a group of approximately eight men came from the plant towards the picketers. This group included David Marson, Jim Marson, vice president and manager of the warehouse, Michael Thigpen, Jack Stein, Kenny Bowler, Jim Vu, and Paul Curry. Miller then turned and attacked De La Fuente with a utility knife. While De La Fuente was struggling to get the knife out of Miller's hand, David and Jim Marson began hitting De La Fuente who was thereafter cut by Miller's knife.

David Marson then struck employee Freddy Reyes. Reyes struck back but then sought to run away as several of the plant personnel came to aid Marson. Reyes was caught by Marson and pinned against a fence where Marson began to hit him. Jim Marson and Jim Vu joined in the beating of Reyes. Vu, using a knife, cut Reyes in the abdomen. There were five males on the picket line but only De La Fuente, Bacon, and Reyes fought with the nonstrikers. Some of the female strikers attempted to pull employees off of Reyes. As a result of this fight De La Fuente, Reyes, and Margarita Vargas, a striking employee, were taken to the hospital. None of the nonstrikers were injured.

Robert Maness, a truckdriver for a neighboring business testified that he observed Miller and De La Fuente getting ready to fight when several of the picketers hit Miller with their signs. Miller and De La Fuente were surrounded by a crowd of picketers. According to Maness, the employees from the plant went to break up the crowd and get Miller out of there. Maness testified that he saw a striker hit David Marson from behind and saw Marson take off after his attacker. Maness was a neutral witness and although he was not able to observe all that occurred, I credit his testimony concerning this incident.

Jack Stein testified that 15 to 20 picketers had surrounded Miller and Jackson. Stein could recall only De La Fuente, Bacon, and Reyes fighting. The other picketers moved out of the way except Margarita Vargas who got in the way and threw some coffee. David Marson did not testify as to this incident. I find Marson's attack on the picketers was extreme and unwarranted in light of the picketers' small number and

nonviolent reactions. There was no excuse for the continued beating of Reyes and the attack with the knife after the employee had been beaten to the ground by David Marson. Again, Marson grasped an opportunity to administer a beating to a striking employee.

As stated earlier, on July 20, Salvador Lopez was recalled from layoff on a part-time basis. Lopez participated in the strike while on layoff. On July 28, Lopez asked David Marson for permission to go to the Immigration and Naturalization Service because he had an appointment for that morning. Marson refused because Lopez had not given him sufficient advance notice.[7] Marson told Lopez that if he left, Marson would assume he was quitting. Lopez said he was not quitting and left for his appointment. Lopez was suspended for 9 days because he left work without permission.

General Counsel does not contend that a suspension for this offense would be unlawful. Rather, General Counsel contends that the suspension would have been 3 days but for Lopez' participation in the Union's strike and picket line. The evidence reveals that prior to these events Respondent never suspended any employee for more than 3 days. Respondent argues that it had no established disciplinary system in effect and therefore could impose any discipline it deemed appropriate. Lopez had previously received a 3-day suspension for unsatisfactory conduct.

The complaint alleges that Respondent refused to allow Maria Thigpen to return to work on July 22 and thereafter, because she had participated in the strike. Maria Thigpen was called as a witness by the General Counsel. Thigpen immediately established that she did not want to testify and was hostile to the General Counsel for requiring her to do so. Thigpen authenticated her union authorization card but thereafter refused to answer General Counsel's questions.[8] When ordered by the judge to answer the questions, Thigpen changed her approach and stated unconvincingly that she did not remember anything. She refused to look at affidavits, which she had given in the investigation of the case, to refresh her memory. Thigpen acknowledged that she had given three affidavits to a Board agent, that the affidavits were read to her in Spanish and that the affidavits were true at the time she gave them. However, Thigpen cannot read or write.

Shelly Coppock, a Board field examiner, testified that she knew Thigpen could not read or write when she transcribed the affidavits. Coppock carefully went through each affidavit with Thigpen, allowing the employee to dictate changes or corrections, and had Thigpen swear to its accuracy before having the witness initial the affidavit at the end. There was no conflict in the testimony of Thigpen and Coppock concerning the taking of the affidavits or their accuracy. I received the affidavits of Thigpen in evidence over the objections of Respondent's counsel. The affidavits were accompanied by an English translation, stipulated by the parties to be accurate.

Respondent's counsel argues that Thigpen's affidavits are hearsay because Thigpen was available as a witness, citing Fed.R.Evid., Rule 804(a). However, I found Thigpen to be unavailable to the General Counsel as a witness under Rule 804(a)(2) because Thigpen refused to answer General Counsel's questions even after being ordered to do so by the Judge. I found Thigpen's professed lack of memory as simply a ruse to refuse to answer questions. I so ruled at the hearing in order to give Respondent's counsel as much notice as possible. However, Respondent did not cross-examine Thigpen as to the subject matter of the affidavits nor did he call her as a witness in his case. I should note that the animus evidenced towards counsel for the General Counsel was not present when Thigpen was cross-examined by Respondent's counsel. Thigpen's demeanor changed markedly when questioned by Respondent's counsel and she answered his questions without difficulty. However, Respondent's cross-examination was limited to the subject of the authorization card. I admitted the affidavits in evidence as exceptions to hearsay under Rules 803(5) and 804(b)(5). See *U.S. v. Winn*, 767 F.2d 527 (9th Cir. 1985), and *Martine Mendoza v. Immigration & Naturalization Service*, 499 F.2d 918 (9th Cir. 1974), cert. denied 419 U.S. 1113 (1975).

Respondent's counsel further argues that he was not permitted to properly cross-examine Coppock because he was not given the Board final investigative reports and agenda minutes prepared by Coppock. For the following reasons, I find no merit to this argument. Coppock was called as a witness by the General Counsel to authenticate the affidavits. After Coppock testified on direct examination, Respondent made a request for all statements given by the witness under the Board's *Jencks* rule. See Section 102.118 of the Rules and Regulations of the National Labor Relations Board. I ruled that the General Counsel was required to comply with the Rule and produce any statement of Coppock dealing with the taking of the affidavits or the credibility of Maria Thigpen. The General Counsel produced for an *in camera* inspection its investigative files. The only ''statements'' of Coppock were investigative reports and agenda minutes which, in relevant part, summarized portions of the affidavits. There were no statements regarding the taking of the affidavits. The only portion of these reports which reflected on Maria Thigpen's credibility was a sentence indicating that with regard to her alleged offer to return to work, apparently denied by David Marson, the Region determined to credit Thigpen. That ''statement'' was made available to Respondent. Coppock, when cross-examined, explained that the Region determined since Thigpen swore that she offered to return to work and David Marson denied it, that credibility question would have to be resolved by an administrative law judge. There were no other statements made by Coppock relevant to her testimony.

In sum, I found that the testimony of Maria Thigpen and Coppock established that Coppock wrote the affidavits, read them in Spanish, made corrections with Thigpen, and read the final version to Thigpen. At the conclusion of the process, Thigpen swore to the accuracy of the affidavits. At the instant hearing Thigpen reaffirmed that the affidavits were true and correct at the time she gave them. Respondent was given an opportunity to cross-examine Thigpen and Coppock or to otherwise impeach Thigpen's statements. I find no merit in Respondent's objections to the admission of Thigpen's affidavits. The question of the reliability of the statements and the weight to be given them will be addressed

[7] The General Counsel concedes that Respondent had a work rule which required Lopez to give prior notice before leaving work early.

[8] Thigpen refused to state why she would not testify. However, General Counsel established that (1) Thigpen's husband, Michael Thigpen, was a supervisor; (2) Thigpen had been reinstated to a lower paid position upon her return to work after the strike, and (3) Thigpen had been offered a promotion to a supervisory position by David Marson, during the week prior to this trial.

below in the analysis and conclusions section of this decision.

According to Maria Thigpen, on July 7, David Marson approached her while she was working and told her that he had heard she was pushing employees to join the Union. Marson told Thigpen that it was illegal for her to do so. Thigpen denied that she was saying anything about the Union to anyone.

Thigpen joined the strike which began July 11. On July 18, while picketing with other employees, Thigpen observed Jim Marson talking to a security guard. The security guard then got into his car and drove into the plant. Suddenly, he put his car into reverse and drove backwards straight at the pickets. The pickets moved out of the way and the car hit Thigpen's automobile which was parked nearby. Jim Marson immediately declared that he had seen nothing. Thigpen reported the incident to the police. The security personnel had been hired after the commencement of the strike. The security guard at issue here was not identified. Although other employees were present, General Counsel called no witnesses to corroborate Thigpen's affidavit.

According to Thigpen, on July 22 she asked David Marson, in the presence of Michael Thigpen, if she could return to work the following week when certain strikers were scheduled to return to work. Marson said she had to speak with his father about returning to work. Thigpen asked why she couldn't return to work and Marson answered that she had quit her job. Thigpen denied that she had quit. In this conversation, David Marson called the striking employees animals and threatened to ''kick [De La Fuente's] ass.'' Thigpen was not able to speak with Richard Marson.

In October, Thigpen again asked David Marson if she could return to work. He informed her that she could return and that he would call her. However, Marson failed to call and notify her as to when she could come back to work.

David Marson testified that he and Colbert conducted an employee meeting on November 8 for the purpose of discussing whether to allow Maria Thigpen to return to work. Only the employees that crossed the picket line during the first week of the strike were instructed to attend the meeting. Colbert told the employees that Thigpen wished to return to work and that Respondent wanted to know how the employees felt about it. Colbert told the employees that Respondent would take a secret ballot on the question of Thigpen's return. He distributed pieces of paper and told the employees to write yes or no if they wanted Thigpen to return. There was no discussion of an employee's right to return to work after a strike. Marson and Colbert left during the vote and later returned to count the ballots. The employees voted 13 to 5 against letting Thigpen return to work.

Notwithstanding that vote, by letter dated November 22, Thigpen was notified that she could return to work on December 4. The letter stated that she had to reply in writing prior to November 28. Respondent admits that no other employee was required to respond in writing prior to returning to work. When Thigpen returned to work in early December, she was given a job as a production employee and paid 25 cents per hour less than she earned prior to the strike. Prior to the strike, Thigpen was an assistant supervisor. No explanation for this demotion and pay cut was given.[9] This demotion and pay cut may well explain Thigpen's unwillingness to testify in this proceeding. The circumstances of Respondent's pretrial offer of a promotion were also not explained.

C. *Analysis and Conclusions*

1. The statements at the employee meetings

Based on the credited testimony, I find that Respondent called an employee meeting on June 30 in order to learn why its employees had begun union organizing. Colbert told the employees that he wanted to know why they wanted union representation and asked them to voice their complaints so Respondent could rectify them. No employee responded to this request.

The Board has held that in the absence of evidence of an established program of grievance meetings, the holding of meetings during a union campaign at which employees are encouraged to air grievances constitutes solicitation of grievances and an implied promise of corrective action if employees reject the union, thereby violating Section 8(a)(1). See *Logo 7, Inc*., 284 NLRB 204, 205 (1987); *Reliance Electric*, 191 NLRB 44 (1971). In the instant case, there was no business reason for the solicitation of grievances. Rather, the purpose was to find out the reasons why the employees sought union representation. Accordingly, I find Respondent solicited grievances and impliedly promised to correct the grievances in violation of Section 8(a)(1).

After unsuccessfully soliciting grievances, Colbert told the employees that they were merely invited guests and that they shouldn't criticize Respondent. He suggested they look for work elsewhere if they were unhappy with their working conditions. Since he assumed they were unhappy, it appears he was suggesting they leave. This was followed up by statements that Respondent would never recognize and bargain with the Union and finally that Respondent would close the plant before bargaining with the Union. All of the above acts imply that Respondent would punish employees' union activities in violation of Section 8(a)(1). See *Professional Eye Care*, 289 NLRB 1376 (1988); *Heck's Inc*., 277 NLRB 916 (1985); *Southern Illinois Petrol*, 277 NLRB 160 (1985); *Thriftway Supermarket*, 276 NLRB 1450 (1985).

2. The threat to subpoenaed employees

On July 5, David Marson told approximately 23 employees that their subpoenas were invalid and that they could be permanently replaced if they went to the hearing. Marson did not say why the subpoenas were invalid. Nor did Marson make any distinction between the employees who would be leaving work to attend the hearing and those who would be attending on their own time. Marson's testimony that he learned the subpoenas were invalid because the proper fees had not been tendered is not credited. First, Marson admittedly had no conversation with the employees in which he would have obtained such knowledge. Further, Marson had just reported to his attorney that the employees had received the subpoenas. There was no way the attorney could have

[9] Respondent's brief states Thigpen was returned to a substantially equivalent position. There was no evidence that Thigpen's position was filled or eliminated nor was there any contention that Thigpen was a supervisor within the meaning of the Act.

known that fees were not tendered. The employees were not told that fees had to be tendered by the party serving the subpoena.

In *Rolligon Corp*., 254 NLRB 22 (1981), relied on by Respondent, the Board found that subpoenas distributed to 20 employees were defective ''on their face'' because they were not accompanied by witness and mileage fees. The Board held that the employer did not violate the Act by telling employees the subpoenas were invalid because they were not accompanied by fees and that the employees were free to dishonor the subpoenas. Moreover, the employer told the employees that they were free to honor the subpoenas and that no discipline would be taken if they decided to honor the subpoenas. Thus, the Board held that the employer's comments were an accurate description of the employees' rights. Since the employer also indicated that employees were free to honor the subpoenas without reprisals, no interference with the employees' Section 7 rights was found.

I find the *Rolligon* case to be of no aid to Respondent here. Respondent did not inform the employees that they could treat the subpoenas as voidable. Rather, Respondent stated without explanation that the subpoenas were invalid. Respondent accompanied this pronouncement with a threat of replacement if employees chose to honor the subpoenas. In order for the Board to fulfill its obligation to adequately administer the Act, it is necessary that its processes not be unjustifiably fettered by anything that precludes parties from participating in such processes free from coercion or restraint.Therefore, an employee has a right to attend a Board hearing or otherwise participate in various stages of the Board's processes. *Southern Foods*, 289 NLRB 152 (1988). I find that Respondent interfered with the Section 7 rights of employees by telling them the subpoenas were invalid and threatening to take reprisals against them if they chose to honor the subpoenas.

On July 7, Respondent informed the employees that only six employees could attend the representation hearing, then scheduled for Monday, July 10. Respondent did not explain why the subpoenas were invalid[10] but only that it would allow three employees from each shift to attend as representatives of the employees. The employees could not agree on representatives; the employees wanted to attend the hearing themselves. Once again Respondent threatened to replace employees that attended the hearing and made no distinction between those leaving work and those attending on their own time. Respondent gave no notice to the employees that it would not participate in the hearing. De La Fuente called Respondent and its attorney in an attempt to work out an accommodation but his calls were not returned. Here again I find Respondent interfered with the employees' Section 7 rights to honor the subpoenas and attend the hearing.

On July 10, rather than schedule production to accommodate the employees' anticipated attendance at the hearing, Marson prepared suspension notices for the employees and handed them out as the employees left believing they were attending a hearing pursuant to subpoena. The suspensions were for 9 days although prior suspensions had been for 3 days or less. Marson informed no one of Respondent's decision not to attend the hearing. Even if Respondent suffered a loss as a result of the employees' departure, a fact supported only by Marson's questionable testimony, its loss was attributable to its own actions rather than the actions of the employees. With notice that the employees were going to attend the hearing, Respondent took no steps to minimize the business disruption. There is no evidence that Respondent could not have made changes in its production schedule. Further, had the employees known that the hearing was uncontested they might not have left work. The evidence leads to an inference that Marson was more concerned with punishing attendance at the hearing than he was with the efficient running of his business. In any event, having interfered with the employees' Section 7 rights and having failed to make accommodations, Respondent is left with no defense to the suspensions which interfere with the employees' right to honor the subpoenas. *Walt Disney World*, 216 NLRB 836 (1975); *Southern Foods*, supra; *U.S. Precision Lens*, 288 NLRB 505 (1988).

3. The picket line allegations

As stated earlier the complaint alleges that David Marson attacked Union Business Agent David Bacon on July 11. Based on the credited testimony of De La Fuente, I find that David Marson attacked Bacon without provocation on the picket line. This event was witnessed by several employees under circumstances where onlookers would likely infer from the assault that the employer would also retaliate in the same fashion against any employee who supported the Union. *Batavia Nursing Inn*, 275 NLR8 886, 891 (1985). See also *Horton Automatics*, 289 NLRB 405 (1988); *Workroom for Designers*, 274 NLRB 840, 855 (1985).

On July 17, after someone threw an egg at David Marson, Marson attacked Jorge Pineda. The sole discernible motive was that Pineda was the only male picketer. There was no evidence that Pineda had provoked Marson or had otherwise engaged in misconduct. Pineda was engaged in peaceful picketing. Marson chased Pineda, threw him against a fence and beat him. This beating was witnessed by seven or eight female employees. Few actions have a more direct tendency to coerce employees in the exercise of their statutory rights than threats of physical harm and genuine acts of physical violence. See *Arcadia Foods*, 254 NLRB 1012 (1981); *Workroom for Designers*, supra at 854.

The credible evidence shows that on August 8, the picketers were in a circle around Miller and Jackson. David and Jim Marson led an attack of eight or nine men from the plant. Only Bacon, De La Fuente, and employee Freddy Reyes fought back. David Marson continued to beat Reyes after the employee was thrown down. Several employees came to Marson's aid to continue the beating and one used a knife to cut Reyes. De La Fuente and Reyes were taken to the hospital for treatment. None of Marson's group was injured. I find no merit to Respondent's defense that Marson was simply coming to the aid of the two employees surrounded by the pickets. Marson went much beyond the reasonable force required to permit the two employees to return to work. He continued an assault on Reyes even after the employee was on the ground defenseless and permitted his employees to join the attack. The purpose was not to protect

[10] Respondent argues that the subpoenas were not valid because they sought attendance on July 7 rather than July 10. I summarily reject that argument. The employees and Respondent all acted under the assumption that the subpoenas were still in effect and that attendance was required on July 10. The failure to tender fees was a separate issue, apparently not raised by Respondent until the instant hearing.

nonstriking employees as argued by Respondent but to physically punish a striking employee.

4. The layoff of the Granola employees

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

On June 21, De La Fuente filed the petition with the Board, visited the plant, and demanded recognition from David Marson. On leaving the plant, De La Fuente and Bacon exchanged greetings with several of the employees making granola bars. One week later, Respondent laid off the employees on the granola line. The layoffs took place at a time when Respondent was engaged in a granola promotion with Barbara's Bakery and being urged by that customer to increase production. At a time when its customer was complaining that it needed more granola bars, Respondent laid off employees producing those bars. The foreseeable result was against both Respondent's and Barbara's business interests. Respondent gave the employees the false reason that there was no granola work. However, the employees could readily see that there was still granola dough to process at the very time they were being laid off. Moreover the employees were aware of all the increased granola production just before their layoff. Respondent did not inform Barbara's Bakery of the layoff. Shortly thereafter, Respondent hired new unskilled employees to work on its cookie line. No explanation was given why the granola employees could not have been used to work on the cookie line.

Further buttressing the inference of an unlawful motive was Marson's shifting reasons for the layoffs. David Marson gave different reasons for the layoffs prior to trial, during the General Counsel's case and later in Respondent's defense. An unfavorable inference may be drawn against the Company for its inability to settle upon an explanation for the layoffs. The failure in itself lends support to the theory that the employees' union support was the real explanation. See *Bay State Ambulance Rental*, 280 NLRB 1079, 1088–1089 (1986). It is also well settled that when the asserted reasons for a discharge or layoff fail to withstand examination, the Board may infer that there is another reason—an unlawful one which the employer seeks to conceal—for the discharge or layoff. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Louisiana Council No. 17, AFSCME*, 250 NLRB 880, 886 (1980); *Reno Hilton*, 282 NLRB 819 (1987). The timing of the layoffs, the fact that they were against Respondent's business interests, the animus established by the contemporaneous unfair labor practices and the shifting and false reasons for the layoffs establish a strong prima facie case that the layoffs were motivated by the employees' union activities.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' protected conduct. Rather than rebutting the prima facie case, Respondent's defense strengthened it. The reasons given by Marson for the layoffs simply do not withstand scrutiny. There were problems with the quality of the granola bars. However, those problems were greater earlier in the year and the amount of returns was decreasing at the time of the layoffs. There was an increased demand from Barbara's Bakery but that increase was based on a promotion sponsored in part by Respondent. Barbara's Bakery had no contact with the Union until after the layoffs. Thus, any increase in orders by Barbara's Bakery in anticipation of a union strike would have taken place after the layoffs. Respondent, already behind in supplying Barbara's Bakery with granola bars, fell further behind. Further, no explanation was given for the hiring of new employees to work on the cookie line while these granola employees were on layoff. There was no explanation for laying off the employees in the middle of a shift with granola dough still to be processed.

The fact that Respondent apparently had no direct knowledge that the granola employees were active in union activities is no defense here. General retaliation by an employer against the work force can discourage the exercise of Section 7 rights just as effectively as adverse action against only known union supporters. *Birch Run Welding v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985); *Americare Convalescent Center*, 280 NLRB 1206, 1211 (1986). Whether or not Respondent believed the focus of the union activity was on the granola line, only Respondent knows. However, the preponderance of the evidence shows that the layoffs were in retaliation for the employees' union activities which led to the petition and demand for recognition.

5. The suspension of Salvador Lopez

As stated earlier, the General Counsel concedes that Lopez had given Respondent insufficient notice before leaving work early on July 28. The evidence shows that Lopez had been unlawfully laid off with other granola employees at the end of June. Further Lopez had participated in the strike while on layoff. He was recalled from layoff on July 20. Lopez had previously received a 3-day suspension. Respondent had no formal or informal progressive disciplinary system. Based on this evidence, I cannot find that the suspension was excessive as argued by the General Counsel. Prior to this time no employee had received a 9-day suspension. However, there was no evidence that any employee had received a second suspension. One employee later received a 5-day suspension for an unexcused absence. However, there is no evidence that the suspension was for a second offense. I find that Lopez was suspended after a second failure to conform to the attendance rules set by the Respondent. I, therefore, find that the General Counsel has failed to sustain his burden of proof that the suspension was motivated by antiunion considerations. Accordingly, I shall recommend dismissal of this allegation of the complaint. See *Tapco Products Co*., 253 NLRB 998, 1001 (1981).

6. The allegations concerning Maria Thigpen

According to the affidavit of Maria Thigpen, on July 6, the day prior to the scheduled representation hearing, David

Marson told Thigpen that he heard that she was pushing employees to join the Unions Thigpen denied doing so. Marson then informed Thigpen that it was unlawful for her to push people to join the Union. Marson did not deny this testimony and I, therefore, credit Thigpen's affidavit. Marson's conversation with Thigpen had no legitimate purpose but was designed to obstruct Thigpen's involvement in Union activities. I find by such conduct Marson was attempting to and did interfere with Thigpen's right to talk to other employees about joining or assisting the Union. By such conduct Respondent violated Section 8(a)(1) of the Act.

Thigpen's affidavit states that after speaking with Jim Marson, a security guard backed his car at pickets and rammed into Thigpen's vehicle. Although this event was witnessed by several pickets, General Counsel called no witnesses to corroborate Thigpen's affidavit. Here, I am reluctant to make a finding solely on the basis of Thigpen's affidavit. As to this allegation, Thigpen's testimony could have been corroborated by other witnesses and was not. Her affidavit was not the most probative evidence on this point and the General Counsel could have procured other witnesses through reasonable efforts. See Fed.R.Evid., Rule 804(b)(5). Accordingly, I shall dismiss this allegation of the complaint.

According to her affidavit, on July 22, Thigpen told David Marson that she was prepared to return to work and abandon the strike. Marson denied her request and referred Thigpen to his father who was unavailable. Marson denies this testimony. This conflict creates a unique credibility problem. I am reluctant to credit Thigpen unless her testimony is corroborated and, on the other hand, I cannot credit David Marson because I found him to be an uncommonly untrustworthy witness. Unlike the picket line incident, there were no corroborating witnesses available to the General Counsel.[11] I choose to credit Thigpen over Marson's denials. Thigpen's affidavit was dated July 25, only 3 days after the conversation. At that point in time, I can find no motive for Thigpen to fabricate an offer to return to work. Respondent could have made an offer to reinstate her on learning of her desire to return to work. However, after admittedly learning of Thigpen's desire to return to work, Marson delayed and placed obstacles in the way of Thigpen's return. Further, the referral of questions to his father was an approach used by David when confronted with a request for recognition and when asked questions he couldn't answer or wouldn't answer at trial. Marson's statements to Thigpen that she had quit are comparable to the statements Marson made to Lopez when Lopez sought to leave work.

In October, Thigpen asked David Marson, on several occasions, if he could return to work. He informed her that she could but he failed to call her, as promised, to give her the details of her return. On November 8, Marson and Colbert conducted an employee meeting to discuss whether to allow Thigpen to return to work. Thigpen's rights to return from the strike were not mentioned. The employees who crossed the picket line during the first week of the strike were permitted to vote. These employees voted 13 to 5 against letting Thigpen return. Thereafter on November 22, Thigpen was notified by letter that she could return to work. Respondent required that the illiterate Thigpen respond in writing. When she returned in December she was given a job which paid 25 cents per hour less than her former position. No explanation for this demotion was given.

As indicated earlier I find that Respondent unlawfully laid off its granola employees shortly after the filing of the Union's petition. Next, Respondent unlawfully suspended employees who sought to attend a scheduled hearing pursuant to subpoenas. The employees ceased work concertedly in response to this unlawful conduct. Thus, it is clear the employees, including Thigpen, were unfair labor practice strikers. *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938). I, therefore, find that Thigpen had a right to return to work upon her unconditional offer to return to work. *NLRB v. Mackay Radio & Telegraph Co*., supra; *Abilities & Goodwill*, 241 NLRB 27 (1979).

Respondent violated Section 8(a)(3) and (1) of the Act by delaying Thigpen's return, by placing obstacles in the way of her return and by reinstating her to an inferior job position at a lower wage rate. Such conduct is inherently destructive of the employees' right to strike. I find nothing democratic nor amusing in the election which placed the question of Thigpen's return to a vote. As an unfair labor practice striker, Thigpen was entitled to return to work even if she had been replaced. In this circumstance, there was no evidence of any impediment to her immediate return. Whatever the purpose of the vote, the effect seems to be to reinforce the concept that Respondent had the power to adversely effect the employees' livelihood, labor laws or not.

7. The bargaining order

In *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), the leading case on remedial bargaining orders, the United States Supreme Court held:

> (1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.
>
> (2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices.
>
> (3) Bargaining orders may be entered to remedy lesser unfair labor practices that nonetheless tend to undermine majority strength and impede the election process. If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring a fair election through traditional remedies is ''slight,'' a bargaining order may issue.
>
> (4) Minor or less-extensive unfair labor practices that have only a minimal effect on election machinery will not support a bargaining order.

As a precondition to a bargaining order, the Board currently requires a showing that the union achieved majority status in an appropriate bargaining unit at some relevant time. *Gourmet Foods*, 270 NLRB 578 (1984). For the following reasons, I find that the union had obtained valid authorization cards from 43 employees in a bargaining unit of no more than 79 employees.[12]

As indicated earlier, I find the Union authorization cards were unambiguous dual purpose cards. See *Nissan Research*

[11] Michael Thigpen, a supervisor, was present but the General Counsel could hardly be expected to call him a witness.

[12] For purposes of this decision it is unnecessary to decide whether Jack Stein, or Jane Wise, are supervisors within the meaning of the Act.

& Development, 296 NLRB 598 (1989). De La Fuente explained that the purpose of the union authorization card was to give the union authority to represent the employees in collective bargaining and that the Union would file a petition with the Board if it became necessary. I find no credible evidence that oral representations, that the sole purpose of the cards was to obtain an election, were made to any employee. By June 24, 4 days prior to the commencement of the Respondent's unlawful antiunion campaign, the Union had 43 valid authorization cards to establish maiority status.

Here Respondent's reaction to the Union's petition and demand for recognition was to unlawfully lay off employees, solicit grievances and make promises and threats, unlawfully suspend employees, attack strikers, and refuse to reinstate strikers.

Where an employer's reaction to employee organizational activities is to engage in swift, pervasive, and severe illegal acts, and the misconduct is enough to convince that it is the type that has lingering effects and that is not readily dispelled by traditional remedies or time, the Board has held that an election would not reliably reflect genuine, uncoerced employee sentiment. See, e.g., *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *Quality Aluminum Products*, 278 NLRB 338 (1986); *Reno Hilton*, 282 NLRB 819 (1987).

In a more recent case, *White Plains Lincoln Mercury*, 288 NLRB 1133, 1139–1140 (1988), the Board discussed the application of the *Gissel* test, as follows:

> Because of the nature, extent, and severity of the Respondent's unlawful conduct in response to its employees' organizational activities . . . we shall require that the Respondent recognize and bargain with the Union. Respondent's unlawful discharge of five employees . . . in immediate retaliation against their card signing, is among the ''less remediable'' of unfair labor practices. Loss of employment, frequently referred to as the ''capital punishment'' of the workplace, has long been recognized as the type of action which will have a long-lasting coercive impact on the work force and demonstrate most sharply the power of the employer over the employees.given the small size of the Respondent's operation and the swift and massive layoffs of employees who had signed cards supporting the Union, the Respondent's actions have a pervasive and lasting impact.
>
> The Respondent did not stop with the discharges, however, but reemphasized its antiunion stance in discussions with the discharged employees in which various threats, including threats to close the business, were repeated on several occasions. Threats to eliminate the employees' source of livelihood have a devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain. See, e.g., *Milgo Industrial*, 203 NLRB 1196, 1200–1201 (1973), affd. mem. 497 F.2d 919 (2d Cir. 1974); *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir. 1980); *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120, 1130 (5th Cir. 1980).

Here, Respondent shortly after the filing of the petition engaged in hallmark violations such as layoffs, solicitations and promises, threats, suspensions, violence, and discrimination against strikers. I find, in light of the violations' seriousness and pervasiveness, the violence, the unit's size, the substantial percentage of unit employees, the Respondent's threats and discrimination directly affected, and the strong possibility of repetition of similar unfair labor practices, that the unfair labor practices involved in this case would tend to undermine the Union's majority status and impede the election process. It appears that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies is slight and that the employee preference expressed through the authorization cards would, on balance, be better protected by a bargaining order.

Respondent argues that because of employee turnover, no bargaining order should issue. For the reasons stated above, I reject that argument. Further, the Board has been reluctant to consider employee turnover in *Gissel* situations. See *Gibson Products Co.*, 185 NLRB 362 (1970). To do so would in effect be rewarding the employer and allowing him to profit from his own wrongdoing. Although some courts have not gone along with the Board in this view, the United States Court of Appeals for the Ninth Circuit, where this case arises, has done so. See *NLRB v. CAM Industries*, 666 F.2d 411, 413 fn. 4 (9th Cir. 1982). I am convinced that the lasting effects of the Respondent's offensive conduct cannot easily be eradicated and that a fair election at this facility is improbable. See *M.P.C. Plating, Inc.*, 295 NLR8 583 (1989); *Massachusetts Coastal Seafoods*, 293 NLRB 716, 723 fn. 10 (1989).

Respondent contends that no bargaining order should issue because ''the Union engaged in acts of misconduct against New Life Bakery, its employees, and its customers.''

In *Laura Modes Co.*, 144 NLRB 1592 (1963), the Board withheld a bargaining order based on the union's use of violent tactics to compel its representation rights. There the Board stated that the withholding of a bargaining order constituted ''an extraordinary remedy'' against a union which would otherwise be entitled to a bargaining order.

In determining whether a union's misconduct is the type that justifies withholding a bargaining order, the Board has considered: the extent of the union's intent in pursuing legal remedies, the extent to which the evidence shows deliberate planning of violence and intimidation on the part of the union, the extent to which the assaults or other misconduct were provoked, the duration of the union's conduct, and the relative gravity of the union's misconduct vis-a-vis the employer's misconduct. *Massachusetts Coastal Seafoods*, supra at *Grede Foundries*, 235 NLRB 363 (1978), enfd. as modified 628 F.2d 1 (D.C. Cir. 1980).

In the instant case the Union filed an election petition and unfair labor practice charges. It was Respondent that unlawfully interfered with the use of legal remedies. Further, the evidence does not establish that the Union planned a course of violence or intimidation against employees. Rather, the only use of misconduct proven here was the throwing of eggs. Such conduct pales in comparison to Respondent's misconduct which included physical violence against union representatives and striking employees. In sum, I find that there were only a few instances of union misconduct here against a background of frequent, serious unfair labor practices by Respondent. Therefore, the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order would not effectuate the purposes of the Act.

Finally, Respondent contends that the Union unlawfully threatened Barbara's Bakery with a secondary boycott. I ruled, as a matter of law, that even if proven, such a threat would not bar a bargaining order. Assuming, arguendo, that the Union threatened a secondary boycott, Section 8(b)(4) of the Act provides an adequate remedy. The facts of this case simply do not support the extraordinary penalty utilized in the *Laura Modes* case. To withhold a bargaining order here would reward Respondent and allow it to benefit from its own wrongdoing.

REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5), I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall offer Maria Thigpen immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed.

Respondent shall make whole all employees for any loss of earnings and other benefits they may have suffered as a result of the unlawful layoffs,[13] by paying them an amount equal to that they would have earned from their layoff dates to the dates of their reinstatement, offer of reinstatement, or date when they would have lawfully been laid off, less net interim earnings, if any, with backpay and interest as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1977). See generally *Isis Plumbing Co*., 130 NLRB 716 (1962). Respondent shall also make whole Thigpen and the 13 employees suspended for attending the NLRB hearing for any losses they may have suffered as a result of the discrimination against them.

Having found that the Respondent began a campaign of unfair labor practices designed to destroy the Union's majority status on June 28, it shall be ordered to recognize and bargain on request with the Union as the exclusive bargaining representative of the bargaining unit employees retroactive to that date. See *Reno Hilton*, supra.

Respondent's unfair labor practices were serious, sweeping, and intolerable. I find that Respondent's general disregard for the employees' statutory rights and the Board's processes warrants the imposition of a broad order directing Respondent from engaging in unfair labor practices ''in any other manner.'' *Hickmott Foods*, 242 NLRB 1357 (1979).

CONCLUSIONS OF LAW

1. Respondent, New Life Bakery, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Glass, Molders, Pottery, Plastic, and Allied Workers International Union, Local No. 164-B, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting grievances and promising to take corrective action; by threatening employees with plant closure and other adverse actions for engaging in union activities; by threatening employees with discharge or suspension for complying with an NLRB subpoena; and by physically attacking picketers and strikers, Respondent has interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act.

4. By laying off employees; by suspending employees; and by refusing to reinstate strikers in order to discourage union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By failing and refusing to recognize and bargain with the Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, New Life Bakery, Inc., Hayward, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or suspending employees because they engaged in union activities.

(b) Refusing to reinstate strikers, refusing to reinstate strikers in a timely proper manner, or refusing to reinstate strikers to their proper position of employment and proper wage rate.

(c) Soliciting grievances from employees and either expressly or impliedly promising to rectify them in order to cause employees to become disaffected with the Union.

(d) Physically attacking or assaulting representatives of the Union, strikers, or picketers.

(e) Refusing to bargain collectively with the Union by engaging in a campaign of unfair labor practices designed to destroy the Union's status as bargaining representative of its employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Maria Thigpen immediate and full reinstatement to the position that she would have occupied if she had not been unlawfully denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that she would have been performing or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges.

(b) Make whole Maria Thigpen, Daniel Ballesteros, Mario Hernandez, Salvador Lopez, Jorge Pineda, Juan Pineda, Francisco Rodriguez, Pedro Rojas, and the 13 employees suspended for attending the NLRB hearing for any loss of pay they may have suffered as a result of the unlawful discrimination against them, in the manner set forth above in the remedy section of this decision.

[13] I have not ordered reinstatement for the employees unlawfully laid off on June 28, because the General Counsel concedes there would have no longer been any work for them in August 1989, after Barbara's Bakery ceased placing orders with Respondent.

[14] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Remove from their files any reference to the unlawful layoffs, suspensions, or refusals to reinstate, of the above employees and notify them in writing that this has been done and that the unlawful personnel actions will not be used against them in any way.

(d) On request, recognize and bargain collectively with the Union as the exclusive collective-bargaining representative from June 28, 1989, with respect to its employees in the unit described below, regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All full-time and regular part-time production employees, shipping and receiving employees, drivers and mechanics employed by Respondent at its 21595 Curtis Street, Hayward, California facility; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(e) Preserve and, on request make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(f) Post at its plant in Hayward, California, copies of the attached notice marked ''Appendix.''[15] Copies of notice, in both Spanish and English, on forms provided by the Regional Director for Region 32, after being signed by a responsible representative of Respondent, shall be posted by it for a period 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''